

STATE OF MICHIGAN
COURT OF APPEALS

VIRGINIA ALBERT, Personal Representative of
the Estate of ELLIS ALBERT, JR.,

Plaintiff-Appellant,

v

MICHIGAN WASTE ENERGY, INC., DETROIT
THERMAL, LLC, DETROIT EDISON, a/k/a
DTE, CITY OF DETROIT, WAYNE COUNTY
ROAD COMMISSION, and GREATER
DETROIT RESOURCE RECOVERY,

Defendants-Appellees.

VIRGINIA ALBERT, Personal Representative of
the Estate of ELLIS ALBERT, JR.,

Plaintiff-Appellant,

v

MICHIGAN HIGHWAY COMMISSION and
MICHIGAN DEPARTMENT OF
TRANSPORTATION,

Defendants-Appellees.

Before: Zahra, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

In these consolidated cases, plaintiff claims appeals from orders entered by the circuit court and the Court of Claims granting motions for summary disposition filed by defendants Detroit Thermal, LLC (Thermal) and Detroit Edison, a/k/a DTE (Edison), and the Michigan Department of Transportation (MDOT). We affirm in each case. These appeals are being decided without oral argument pursuant to MCR 7.214(E).

UNPUBLISHED
March 29, 2007

No. 271645
Wayne Circuit Court
LC No. 04-418768-NO

No. 271646
Court of Claims
LC No. 04-000090-MZ

Plaintiff's decedent parked his car on Gratiot Avenue in Detroit. Steam was emanating from a manhole in the road, and obscured decedent's appearance. Decedent was struck by a vehicle as he attempted to cross the road, and died from the injuries he sustained in the accident.

Plaintiff's amended complaint, filed in circuit court, alleged that defendant Michigan Waste Energy, Inc., (MWE) was under contract to operate the piping system that supplied steam heat for various locations in the City of Detroit, and negligently failed to maintain the system so that steam would not emanate from manholes and obscure the vision of drivers and pedestrians. The complaint also alleged that Thermal and Edison owned and operated the piping system, and negligently failed to maintain the system so that steam would not emanate from manholes and obscure the vision of drivers and pedestrians. The complaint made the same allegation against the City of Detroit.¹

Thermal and Edison moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that they owed no duty to decedent because they did not own or control the piping system, and that any alleged failure to act regarding contractual maintenance did not give rise to an action in tort. Thermal and Edison asserted that prior to decedent's death, MWE entered into a contract with Greater Detroit Resource Recovery to operate a maintenance facility. Pursuant to the contract, MWE was responsible for maintaining portions of the steam piping system in Detroit. MWE contracted with Edison for performance of routine maintenance of the steam system. Edison and Thermal entered into a purchase and sale agreement pursuant to which Thermal agreed to perform only routine maintenance on the system. The agreement provided that repairs of buried leaks, replacement of valves, etc., would be performed by MWE. Detroit and Thermal contended that because they did not own the system, and because MWE was responsible for undertaking repairs such as removing excess water from under the manhole covers to prevent the production of excess steam, they were not liable for decedent's death.

Thermal and Edison asserted that their purchase and sale agreement was not amenable to a third-party beneficiary claim because the agreement specifically stated that it did not benefit any person or entity not a party thereto. *Koenig v South Haven*, 460 Mich 667, 676-677; 597 NW2d 99 (1999). Thermal and Edison claimed that because they owed no duty to plaintiff separate and distinct from their contractual duties, no tort action could be maintained. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004).

In response, plaintiff argued that her claims against Thermal and Edison were based not on a breach of contract theory, but rather on a negligence theory. Plaintiff contended that the fact that Thermal and Edison did not own the system was irrelevant.

¹ Plaintiff's Court of Claims complaint made the same allegations against MDOT as did the circuit court complaint against the defendants in that case. The cases were consolidated. Via a stipulated order, the trial court dismissed the Wayne County Road Commission from the circuit court case.

The trial court granted the motion for summary disposition filed by Thermal and Edison. The trial court found that Thermal and Edison could not be held liable for decedent's death because they owed no duty to decedent separate and apart from their contractual duties.

MDOT moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that plaintiff's claims were barred by governmental immunity. MDOT asserted that its duty to maintain the roadway in reasonable repair extended to only the improved portion of the roadway designed for vehicular travel, and that the alleged defect, excess steam, was not part of the physical structure of the roadway itself. *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 180; 615 NW2d 702 (2000).

In response, plaintiff contended that the manhole was a portion of the roadway itself, and asserted that MDOT failed to maintain the road in reasonable repair to prevent the escape of steam from the manhole.

The trial court granted MDOT's motion for summary disposition. The trial court noted that the manhole cover was not defective, and that the danger resulted from the steam. The trial court concluded that MDOT was entitled to summary disposition because the steam was not part of the improved portion of the roadbed.

D o c k e t N o . 2 7 1 6 4 5

We review a trial court's decision on a motion for summary disposition de novo. A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim. It must be decided on the pleadings alone, with all well-pled facts and reasonable inferences taken as true. The motion should be denied unless the claim is so clearly unenforceable as a matter of law that no factual support could establish the claim and justify recovery. *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). In reviewing the decision on a motion brought pursuant to MCR 2.116(C)(10), we must review the record evidence and all reasonable inferences drawn therefrom in a light most favorable to the nonmoving party, and decide whether a genuine issue of material fact exists. *Trepanier v Nat'l Amusements, Inc*, 250 Mich App 578, 582-583; 649 NW2d 754 (2002).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). A prima facie case of negligence may be based on legitimate inferences, provided that sufficient evidence is produced to take the inferences "out of the realm of conjecture." *Ritter v Meijer, Inc*, 128 Mich App 783, 786; 341 NW2d 220 (1983).

The issue of duty is a question of law for the court. *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977). The concept of duty encompasses whether the defendant owes the plaintiff an obligation to avoid negligent conduct. In deciding whether a duty should be imposed, the court must look at several factors, including the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented. If

no duty exists, there can be no actionable negligence. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 359; 584 NW2d 345 (1998).

Plaintiff argues that the trial court erred by granting the motion for summary disposition filed by Thermal and Edison. We disagree.

MWE's contract with Edison and Edison's purchase and sale agreement with Thermal established that Edison and Thermal were responsible for routine maintenance of the steam system. MWE was responsible for repairs. The threshold question in a negligence action is whether the defendant owed a duty to protect the plaintiff against the condition that caused the harm. *Fultz, supra* at 463. A tort action resulting from misfeasance of a contractual obligation must be based on the existence of a duty separate and distinct from the contractual obligation itself. *Id.* at 467. Here, the obligation undertaken by Thermal and Edison to maintain the steam system was based entirely on contract. No evidence showed that either Thermal or Edison owed decedent a duty separate and distinct from their contractual obligation to perform routine maintenance on the steam system. In the absence of such a duty, Thermal and Edison cannot be held liable in tort for decedent's fatal injuries. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 571 NW2d 716 (1997).

Moreover, decedent could not assert a claim as a third-party beneficiary of the contract between MWE and Edison and the agreement between Edison and Thermal. An incidental beneficiary to a contract may not assert a claim for breach of that contract. A third party cannot maintain an action on a simple contract merely because he would receive a benefit from its performance or would be injured by its breach. A contract must contain an express promise to act for the benefit of a third party in order for that third party to gain third-party beneficiary status. See *Real Estate One v Heller*, 272 Mich App 174, 177-178; 724 NW2d 738 (2006), quoting *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003). Here, neither the contract between MWE and Edison nor the agreement between Edison and Thermal contained an express promise to act for the benefit of a third party such as decedent.

The trial court did not err by granting summary disposition in favor of Thermal and Edison.

D o c k e t N o . 2 7 1 6 4 6

When reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(7), we must accept as true the plaintiff's well-pled allegations and construe them in a light most favorable to the plaintiff. The motion should not be granted unless no factual development could provide a basis for recovery. *Smith v YMCA*, 216 Mich App 552, 554; 550 NW2d 262 (1996).

The highway exception to governmental immunity, MCL 691.1402(1), provides that a governmental agency having jurisdiction over a highway must "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." An imperfection in the roadway arises to the level of a compensable defect only when it renders the roadway not reasonably safe for public travel, and the governmental agency having jurisdiction over the roadway is aware of this fact and fails to take corrective action. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 168; 713 NW2d 717 (2006).

The determination of the applicability of the highway exception is a question of law subject to de novo review on appeal. *Meek v Dep't of Transportation*, 240 Mich App 105, 110; 610 NW2d 250 (2000).

Plaintiff argues that the trial court erred by granting the motion for summary disposition filed by MDOT. Plaintiff asserts that the manhole is an integrated part of that portion of the highway intended for vehicular travel, and that MDOT failed to keep the roadway in reasonable repair so that it was reasonably safe and convenient for public travel. We disagree.

The crux of plaintiff's argument is that MDOT failed to keep the roadway in reasonable repair because steam was allowed to escape from vent holes in the manhole cover, thereby obscuring the view of drivers in the area. Essentially, plaintiff's claim is one for defective design. Immunity for the agency having jurisdiction over a roadway is not abrogated for a particular point of hazard on the roadway affecting travel on the surface of the roadway. *Nawrocki, supra* at 175-176. Moreover, the highway exception does not extend to claims based on defective design. *Hanson v Mecosta Co Rd Comm*, 465 Mich 492, 502; 638 NW2d 396 (2002).

The trial court did not err by granting summary disposition in favor of MDOT.

Affirmed.

/s/ Brian K. Zahra
/s/ Richard A. Bandstra
/s/ Donald S. Owens